No. 87-1799

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

NOBEL SCIENTIFIC INDUSTRIES, INC.,
Petitioner,

v.

BECKMAN INSTRUMENTS, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

EDWARD L. BLANTON, JR.,
BLANTON & MCCLEARY,
Suite 210 Bosley Building,
210 Allegheny Avenue,
Towson, Maryland 21204,
(301) 296-8160,
Attorneys for Petitioner.

The Daily Record Co., Baltimore, MD 21202

QUESTIONS PRESENTED FOR REVIEW

1. Whether the principle of *per se* illegality with respect to the tying of commodities to patented products survived *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984)?

2. What evidence, if any, defining the scope and boundaries of a relevant product market is sufficient to avoid entry of summary judgment against a plaintiff in an antitrust case?

3. Whether a unilateral refusal to deal, motivated solely by a anti-competitive purpose and having an anti-competitive effect, is a *per se* violation of the Sherman Act?

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TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Nobel Scientific Industries, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the

Fourth Circuit entered in this proceeding on October 27, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 831 F.2d 537 (4th Cir. 1987) and is reproduced in Appendix A hereto, commencing at page A.1. The opinion of the District Court for the District of Maryland is reported at 670 F. Supp. 1313 (D. Md. 1986) and is reproduced in Appendix A hereto, commencing at page A.3.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on October 27, 1987 (A.35). Petitioner's timely Petition for Rehearing and Suggestion for Rehearing *In Banc* was denied on February 3, 1988 (A.36), and this Petition for Writ of Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND RULES

United States Code, Title 15:

Section 1. Trusts, etc., in restraint of trade illegal; penalty.

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Section 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Section 14. Sale, etc., on agreement not to use goods of competitor

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

Federal Rules of Civil Procedure, Rule 56.

Summary Judgment.

* * * * * *

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

STATEMENT OF THE CASE

Beckman Instruments, Inc. ("Beckman"), manufactures and sells directly to hospital clinical laboratories, automated blood-chemistry analyzers[1] and reagents used in their operation. In January 1978, its top management held a long-range planning meeting at Whispering Palms, California, at which a "Don't 'play Fair'" policy was devised to "Lockout" competitors selling reagents adapted

[1] Analyzers, the tying products in this case, are hospital instruments dedicated to analyze specific chemical constituents found in patient blood samples. The tied products, reagents, are chemical solutions used as reaction agents with patient blood samples being tested on the analyzers.

Hospital clinical laboratories need both individual clinical test results and combinations of tests, called profiles. The most frequently requested profile consists of *seven analytes* — glucose, BUN, creatinine, sodium, potassium, chloride, and bicarbonate — needed to diagnose and treat patients experiencing heart attacks or other trauma. Such patients are most frequently found in intensive care or shock-trauma units, and immediate test results on an emergency, or "stat", basis are essential for their treatment.

Of the roughly 160 clinical laboratory tests, 16 are classified as "chemistry" tests. Other classifications include serology, microbiology, and hematology. Ninety (90%) per cent of all stat chemistry tests in the United States are for the seven analytes involved in this case (*See* Ct. App. Jt. Apx. III, p. 1634).

for use on Beckman analyzers (Ct. App. Jt. Apx. III, p. 1654). Beckman implemented its "Don't 'play Fair' " policy by engaging in a pattern of anti-competitive conduct which included contractually tying the sale of its reagents to its patented analyzers,[2] refusing to sell analyzers to hospitals unless they purchased reagents from Beckman, refusing to sell analyzers to competing reagent manufacturers, intentionally "botching" test results of reagents manufactured by others when used on Beckman analyzers in hospital laboratories, and denying critical twenty-four hour telephone "hotline" service to hospital laboratories which used competitive reagents (Ct. App. Jt. Apx. I, pp. 256-57, 278, 393; III, pp. 1607, 1631, 1638-39, 1644-45).

With the objective of "levering the customer into purchasing Beckman reagents," Beckman also tied its service contract and the availability of proprietary replacement parts to its reagent contracts, increasing the price of the former by 20% and the latter by 800% for customers using competitive reagents (Ct. App. Jt. Apx. I, p. 272; III, pp. 1610, 1672, 1684-95). Moreover, such customers' "hotline" calls were either not answered or put on hold behind customers using Beckman reagents (Ct. App. Jt. Apx. I, pp. 256-59). These activities prevented

[2] Beckman's tying not only realized monopolistic goals but avoided taxes as well. In *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 13, n. 19 (1984), quoting *Fortner Enterprises, Inc. v. U.S. Steel Corp.*, 394 U.S. 495, 512-14 (1969) ("Fortner I") (White, J., dissenting), this Court stated that one incentive to tie is "to *evade price control* in the tying product through clandestine transfer of the profit to the tied product." (emphasis added) Here, one incentive to tie and thereby transfer profit to the tied product was to *avoid taxes*. Revenue from the sale of Beckman's analyzers, proprietary parts and service contracts sold in the United States, was fully taxable in the United States. Revenue from Beckman's reagents, however, was *not* taxable because they were made in Puerto Rico (*See* Ct. App. Jt. Apx. III, p. 1648). Thus, by tying the sales of its analyzers to its reagents, Beckman was able to transfer profit from the tying and taxed product (analyzers) to the tied and untaxed product (reagents) exactly as Justice White described in *Fortner I, supra*.

reagent manufacturers and their distributors from selling reagents in competition with Beckman (Ct. App. Jt. Apx. III, pp. 1624-25), and allowed Beckman to sell its reagents at twice the price of competitors by threatening loss of hotline service (Ct. App. Jt. Apx. I, p. 393).

One competitor harmed by Beckman's conduct was Nobel Scientific Industries, Inc. ("Nobel"), whose only business was manufacturing reagents for use on a variety of analyzers, including Beckman's.[3] Beckman's coercive tactics discouraged Nobel's prospective customers from purchasing its reagents; and when threatened with the loss, or increased cost, of replacement parts and services, Nobel's customers were forced to buy Beckman reagents (Ct. App. Jt. Apx. III, pp. 1624-25, 1638). In furtherance of its anticompetitive objective, Beckman refused to sell its analyzers to Nobel, thus preventing Nobel from testing the compatibility of its own reagents with Beckman analyzers.[4]

Nobel brought suit in December, 1980, under Section 3 of the Clayton Act and Sections 1 and 2 of the Sherman Act charging Beckman with, *inter alia,* engaging in *per se* illegal tying arrangements. Specifically, Nobel alleged that Beckman unlawfully tied the price and the availability of its patented and unique automated blood-chemistry analyzers, including proprietary parts, hotline, and service contracts, all under Beckman's exclusive control, to reagents necessary for their use. Nobel established that Beckman, which specialized in analyzers used to perform stat chemistry tests, responded to the

[3] Nobel ceased operations on July 12, 1986, the day following the District Court's entry of summary judgment.

[4] Reagents marketed for use on one manufacturer's analyzer will not be accurate and, thus, are not used on any other manufacturer's analyzer. In fact, reagents used to perform most of the seven tests on Beckman's discrete (or "dedicated") analyzers, are not used to perform the same tests on Beckman's ASTRA analyzers (Ct. App. Jt. Apx. III, pp. 2036-38).

growing demand for stat testing of the most frequently performed chemistry tests, *see* note 1, *supra,* by introducing its ASTRA 4 and ASTRA 8 analyzers in 1978. Beckman's analyzers were protected by twenty-two separate patents (Ct. App. Jt. Apx. III, p. 1595). By 1983, more than half of all tests (both stat and routine), and more than 75% of all stat tests for the seven analytes were performed on Beckman analyzers (Ct. App. Jt. Apx. III, p. 1844). By 1983, Beckman retained 95% of the $100 million annual market for reagents used on its analyzers, while maintaining prices at a level that produced a gross profit of 80% (Ct. App. Jt. Apx. III, pp. 1631, 1718). Nobel's expert witness computed the elasticity of demand for Beckman's reagents, based upon standard principles of microeconomic theory, to be 1.2, where 1.0 represents perfect monopoly, and infinity represents perfect competition.[5]

The District Court was "convinced that if monopoly power exists, then genuine issues of material fact exist as to the second element, acts taken to acquire or maintain that power." (A.9). It viewed the possession of monopoly power in the relevant market as essential to *all* of Nobel's claims. Although the District Court understood *Jefferson Parish* to condemn *per se* tying arrangements where there is a probability that "the existence of market power, or leverage, . . . 'force[s] a purchaser to do something that he would not do in a competitive market'" (A.30), it rejected

[5] Dr. Bruce Hamilton, Chairman of the Political Economy Department of The Johns Hopkins University, explained in his affidavit to the District Court (*see* Ct. App. Jt. Apx. III, pp. 2049-50, 2081-94), that his calculation was based upon the widely accepted "mark-up formula" and the fact that Beckman's list price for its reagents, as late as 1985, conservatively represented an average six-fold mark-up over marginal cost. Dr. Hamilton noted that 1.2 is an extremely low elasticity of demand for even a highly monopolized firm, and proves Beckman's monopoly power in the market for reagents used on its analyzers.

the presumption of market power created by Beckman's patents and held that inquiry into market power "requires an analysis of the relevant product market." (A.31).

Beckman conceded that there was but one issue before the District Court, which was "dispositive of all of the claims," and that was "whether [Nobel] has produced legally sufficient evidence of the relevant product market for antitrust purposes." (Ct. App. Jt. Apx. III, p. 1851). The Court disposed of Nobel's claim that Beckman had engaged in *per se* illegal tying and granted summary judgment for Beckman on the ground that "summary judgment is appropriate for litigation where definition of the relevant product market is at issue." (A.8). The Fourth Circuit affirmed on the opinion of the District Court[6] (A.3).

REASONS FOR GRANTING THE WRIT

I. The decision below conflicts with decisions of other Courts of Appeal as to the proper interpretation of *Jefferson Parish Hosp. Dist. No. 2. v. Hyde,* 466 U.S. 2 (1984).

The Court below concluded that, even in the case of a *per se* illegal tying arrangement, its inquiry into market power, or "leverage," requires relevant product market analysis (A.31). This conclusion conflicts with this Court's clear reaffirmation of the principle of *per se* condemnation of certain tying arrangements in *Jefferson Parish.* By definition, *per se* condemnation of tying arrangements is "condemnation without inquiry into actual market conditions," 466 U.S. at 15, and the very rationale for the *per se* tying doctrine "is to avoid a burdensome inquiry into actual market conditions in situations where the likelihood of anti-competitive conduct is so great as to render

[6] Because the Court of Appeals affirmed the judgment of the District Court on the opinion of the District Court, see A.3, and adopted the legal conclusions of the District Court as its own, those conclusions will hereinafter be referred to as those of the Court of Appeals.

unjustified the cost of determining whether the particular case at bar involves anti-competitive conduct." 466 U.S. at 15-16, n. 25.

Concluding that "there is no market power in any tying product and Nobel's Clayton Act claims must fail," (A.33), the Court in the instant case ignored the 22 patents covering Beckman's analyzers and improperly made a factual finding that "[f]or the instruments, as well as service and parts, there are readily available substitutes, available from many people. Any attempt to raise price[s], or impose burdensome conditions, will merely result in customers avoiding Beckman." (A.33). But Beckman did raise prices and impose burdensome terms (*see* Ct. App. Jt. Apx. III, pp. 1632-33), and customers were unable to avoid Beckman (*see* Ct. App. Jt. Apx. I, p. 393). In finding the evidence "uncontradicted that other machines have the same qualities such as stat interrupt capability that Nobel claims are unique and distinctive in the Beckman analyzers," (A.16-17), the Court overlooked admissions in the record which established that for at least five years after its introduction in 1978, Beckman had the *only* analyzer with *automated stat/routine interrupt* capability (*see* Ct. App. Jt. Apx. III, p. 1795). Not only was the analyzer patented, Beckman claimed it was unique, and Beckman's customers claimed it "was the best thing on the market at that time" and "there was nothing else that could touch it." (Ct. App. Jt. Apx. III, p. 1609). The presence of these factors also makes *per se* condemnation appropriate under *Jefferson Parish*.

While acknowledging that the tying product, Beckman's analyzers, were patented, the Court concluded that unless the patent covered the whole product, no presumption of economic power arose (A.32). In *United States v. Loew's, Inc.*, 371 U.S. 38, 45-47 (1962), this Court upheld the presumption that a seller has market power in a patented product. This view was reiterated in *Jefferson Parish*. *See*

466 U.S. at 16. In *Northern Pacific R. Co. v. United States*, 356 U.S. 1 (1958), this Court noted, citing *International Salt Co. v. United States*, 332 U.S. 392 (1947), that although a patent does not always confer a monopoly over the tying product and may be limited to a unique form or improvement of the product, resulting in only slight economic power resulting from the patent, proof of satisfactory substitutes for the patented product is still irrelevant. *See* 356 U.S. at 10, n. 8. In *Standard Oil Co. of California v. United States*, 337 U.S. 293, 307 (1949), this Court held that even where there may be competing substitutes for a patented product, the patent is at least *prima facie* evidence of market power with regard to the tying product.

The Court below drew heavily upon Justice O'Connor's concurring opinion in *Jefferson Parish*, which states that "a patent holder has no market power in any relevant sense if there are close substitutes for the patented product." 466 U.S. at 37, n. 7. It has been settled since *United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377 (1956), that patented products enjoy no special advantage over other reasonably substitutable products (patented or not) — price, use and quality considered — when the issue is definition of a relevant product market for the purpose of measuring monopoly power in that market. When inquiring into "economic power," "leverage," or "market power" sufficient to make "forcing" probable in a *per se* tying case, if the tying product is covered by a patent — even in the presence of competing substitutes — the patent is *prima facie* evidence of market power ("economic power" or "leverage") in the tying product for purposes of *per se* condemnation of tying arrangements, and negates the need for independent proof of market power in a relevant product market for the tying product. The decision in the instant case blurs the distinction between the plain relevance of a patent on the

tying product under the *per se* tying doctrine and the irrelevance of a patent on a product when the inquiry is inclusion within a relevant product market under the reasonable interchangeability standard. *See Jefferson Parish,* 466 U.S. at 16.

The Court's interpretation of *Jefferson Parish* in the instant case is inconsistent with the Ninth Circuit's holding in *Digidyne Corp. v. Data General Corp.,* 734 F.2d 1336 (9th Cir. 1984), *cert. denied,* 473 U.S. 908 (1985). The district court in *Digidyne* had held that the plaintiffs "'could not recover on the alleged tie-ins unless they identified and proved the relevant market for the tying and tied products.'" 734 F.2d at 1339. The Ninth Circuit held that it was error to require "proof of power to fix the price of the tying product in the whole of the relevant market . . ." 734 F.2d at 1339. Noting the abundant evidence that the tying product was particularly desirable to a substantial number of buyers, and that the tying product was copyrighted, *see* 734 F.2d at 1341, the Ninth Circuit held, relying on *Jefferson Parish,* 466 U.S. at 16, that the copyright "created a presumption of economic power sufficient to render the tying arrangement illegal *per se*." 734 F.2d at 1342, 1344.

These cases are analogous, and the results should be the same. The sharp contrast between the Ninth and Fourth Circuit's understanding and application of the decision in *Jefferson Parish* on this critical question merits the grant of certiorari to review the judgment in the Court below.

II. The decision below raises significant and recurring problems concerning what evidence an antitrust plaintiff must produce to avoid entry of summary judgment in relevant product market cases.

In *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574 (1986), this Court held that summary

judgment is appropriate in antitrust litigation, where plaintiff's claims "make no economic sense." Beckman's tying arrangements, aside from violating the antitrust laws, make a great deal of economic sense. Beckman's "Lockout" policy not only forced purchasers of its analyzers to purchase Beckman reagents, it also enabled Beckman to shift its profits to the reagents, which were manufactured in Puerto Rico, a tax haven, and thereby avoid income taxes. Beckman's "Lockout" policy did not require Beckman to sustain any losses in order to reap the financial benefits of its anticompetitive conduct. Unlike the defendants in *Matsushita*, Beckman has not been charged with conspiring with another manufacturer to fix prices; rather, Beckman has been charged with engaging in *per se* illegal tying arrangements involving a tying product on which its holds 22 patents, which create a presumption of market power. In *Matsushita*, there was no presumption of a conspiracy to fix prices.

The Court below relied upon *Stearns v. Genrad*, 752 F.2d 942, 946-7 (4th Cir. 1984) for the proposition that "[w]hen a Court finds that the correct market definition precludes plaintiff's claims summary judgment should be granted." (A.8). *Stearns* involved a terminated distributor's antitrust claims against a manufacturer-supplier; it was *not* a tying case. No *per se* illegal conduct was alleged, and the plaintiff was required to define a relevant product market. The legal and factual distinctions which distinguish both *Matsushita* and *Stearns* from the instant case are fundamental.

Relying upon these two antitrust cases and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), the Court below held that "'Rule 56(c) mandates the entry of summary judgment after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an essential element

to that party's case, and on which that party will bear the burden of proof at trial.'" (A.8). The essential element was the relevant product market, and the Court stated that summary judgment should be granted when it "finds that the correct market definition precludes plaintiff's claims. . . ." (A.8).

The Court equated "sufficient showing" with "sufficient evidence supporting the complaint to warrant a lengthy jury trial," (A.7), and then made its finding of the "correct market definition," without considering the evidence presented by Nobel. Of the 45 references to the record in the Court's opinion, 40 refer to Beckman's evidence. Nobel's evidence in support of its Complaint, synopsized on pages 10 through 15 of its Brief in the Court of Appeals shows, *inter alia*: acute care hospitals have a demand for performing stat tests on seven critical analytes in the care of critically ill patients; no one analyte test is a substitute for any other[7]; and analyzers which perform stat tests have an advantage over those which perform only routine tests — an advantage which is magnified when the analyzer can interrupt routine testing for the purpose of performing a stat test, and is maximized when the interrupt ability is automated. No analyzer performs all tests, and some analyzers perform but one test.[8] No

[7] It is fundamental that, for example, a potassium test will not suffice when the physician has requested a glucose test. Nobel adduced evidence from various laboratory pathologists on this issue, and their unanimous agreement as to unsubstitutability of the tests is uncontradicted in the record (*See* Ct. App. Jt. Apx. III, pp. 1634, 1637).

[8] The Court below believed that a "broader market" included other companies, other analyzers and other tests, and that if "other analyzers compete effectively with the Beckman analyzers, then the relevant product market must include the sale of reagents for those analyzers as well." (A.11-12). Since one test is not substitutable for any other, *see* note 7, *supra*, however, an analyzer is not interchangeable unless it performs at least one of the seven tests. As for other companies and their analyzers, the Court did not either understand or consider evidence, based

analyzer, but Beckman's, had *automated* stat interrupt ability between 1978 and 1985. Statistics compiled by Luning-Prak, a recognized industry source, for 1983, show that more than 75% of all stat tests on the seven critical analytes were performed on Beckman analyzers, and some 49% to 61% of all tests, both stat and routine, of these seven analytes performed in hospital clinical laboratories were performed on Beckman's analyzers (Ct. App. Jt. Apx. III, pp. 1843-46, 2054-74). In the same year, with respect to reagents used on its own analyzers, Beckman sold more than 95% of the reagents used on its ASTRA analyzers, and 85% of the reagents used on its dedicated clinical chemistry analyzers.

Nobel took the position in the Court below that no relevant product market need be identified or proved insofar as its *per se* tying claims were concerned. Aware of the inroads made into *per se* tying by the Rule of Reason in *Jefferson Parish,* Nobel chose not to abandon its Section 2 claims, and to present evidence of three overlapping but, nevertheless, rational relevant product markets which meet the *duPont* requirements. In its pleadings, Nobel defined the relevant product markets as reagents for use on Beckman's discrete analyzers and reagents for use on Beckman's ASTRA analyzers. Since reagents used on each are not formulated for use on the other, and in fact, are

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upon standard industry data, indicating the dominance of Beckman's analyzers over "other analyzers [which] compete effectively with Beckman's analyzers. . . ." Nobel presented, in tabular form, the market shares of all blood chemistry analyzer manufacturers whose analyzers were capable of performing any of the unsubstitutable tests Beckman's analyzers performed (*See* Ct. App. Jt. Apx. III, pp. 2054-74; *see also* Nobel's Appellant's Brief, page 4). The market shares of the six leading manufacturers (*i.e.*, those with any statistically measurable market share) were further presented in narrative and graphic forms (*See* Ct. App. Jt. Apx. III, pp. 1838-46). The data, in both forms, clearly demonstrate that Beckman's analyzers dominated the market for analyzers which could perform any of the same unsubstitutable tests which Beckman's analyzers could perform.

not so used, they are not substitutable, and a jury might reasonably find a narrow relevant market.[9] Whether the relevant market in which the parties compete is limited to reagents used to perform each of the seven tests on (a) Beckman's ASTRA analyzers and those used on its

[9] Indeed, in a substantially similar case, on December 2, 1987, the United States District Court for the District of Minnesota denied Beckman's Motion for Summary Judgment on an antitrust counterclaim against it in *Beckman Instruments, Inc. v. Kallestad Laboratories, Inc.*, Civil No. 4-83-940. A copy of this ruling is reproduced in Appendix B hereto, commencing at page B.1. The thrust of Beckman's Motion was that Kallestad could not meet its burden of proving a narrow definition of the relevant product market.

Kallestad contended in its counterclaim that Beckman had monopolized or attempted to monopolize either of two product markets: (1) specific protein reagents suitable for use on Beckman's ICS immunochemistry analyzer when used in its "normal" mode, *i.e.*, the particular analysis was programmed by an optically encoded film program card attached to each Beckman reagent vial and inserted into a reader on the analyzer — a patented method, or (2) the fifteen most commonly used protein reagents, but excluding one particular form of such reagents known as RID plates. Kallestad also alleged that Beckman had engaged in an unlawful tying arrangement by forcing its ICS customers to purchase Beckman reagents in order to practice the patented method used in the "normal" mode.

Beckman argued that the relevant product market encompassed all clinical laboratory analytical systems and materials capable of performing serum protein and therapeutic drug monitoring tests. Beckman contended, *inter alia*, that the relevant product market cannot consist solely of after-sale items for one manufacturer's products where competitive products exist. The Minnesota Court rejected Beckman's arguments, however, and held that under *Brown Shoe Co.*, a reasonable jury could conclude that either of Kallestad's proposed alternatives could constitute the relevant product market.

Beckman settled its case against Kallestad in early 1988, as it had settled an antitrust suit brought against it by another reagent manufacturer competing in the same reagent market as Nobel, based upon the same conduct of which Nobel complains. The terms of the settlement were sealed. *See Hi-Chem, Inc. v. Beckman Instruments, Inc.*, CV #81-6464, United States District Court for the Central District of California.

discrete analyzers; (b) all stat clinical chemistry analyzers which perform any of the seven tests, or (c) all glucose, (and similarly, for the other six analytes) analyzers, Beckman still possesses monopoly power in all of them. *Cf. Broadway Delivery Corp. v. United Parcel Service*, 651 F.2d 122 (2d Cir. 1981).

The skepticism of the Court below toward a market definition it perceived as narrow ignores the fact that this case involves a highly specialized industry — United States health care — with correspondingly specialized demands and producers to supply those demands. Furthermore, this Court has said that illegal monopolies "may well exist over limited products in narrow fields. . . . In determining the market under the Sherman Act, it is the use or uses to which the commodity is put that control." *See duPont, supra*, 351 U.S. at 395-96; *accord Beckman Instruments, Inc. v. Kallestad Laboratories, Inc.*, note 9, *supra*, and Appendix B, *infra*.

The issue is an important one, upon which the continued viability of the antitrust laws may well depend. Some district court judges are convinced that the issue of a relevant product market is an ultimate fact, which is primarily a question of policy, permitting the district judge to decide, on a case by case basis, what kind of conduct should be penalized, *i.e.*, which cases may go to a jury.[10] Not only are there serious Seventh Amendment considerations involved in this policy, but the absence of any standard established by this Court as to how much evidence an antitrust plaintiff must present to survive a motion for summary judgment in a relevant product market case, effectively repeals the antitrust laws from the standpoint of private plaintiffs in many district courts.

[10] A frank statement of this view is presented in an interview with District Judge William W. Schwarzer of the Northern District of California in the Fall, 1987 issue of *Antitrust*, Volume 2, No. 1, pages 32-36, a publication of the Section of Antitrust Law of the American Bar Association.

In this case, Nobel was aware from the outset that a motion for summary judgment, predicated upon relevant product market definition, was forthcoming. Beckman has never denied any of Nobel's factual allegations, but relied instead upon its belief that Nobel would be unable to prove a relevant product market in which the parties competed, and that failure would immunize Beckman against antitrust violations. Beckman's Motion, and Nobel's response, were directed *solely* to that issue (*see* Ct. App. Jt. Apx. III, p. 1851). After 118 depositions and "six years of discovery," (*see* Section III, *infra*) the record contains evidence pertaining to every aspect of any rational, relevant product market, based upon the *duPont* definition and the submarket criteria set forth in *Brown Shoe Co. v. United States,* 370 U.S. 294 (1962). The issue is material, and the dispute genuine. The District Court, hoping to avoid a lengthy jury trial, focused upon Beckman's arguments, rather than Nobel's evidence, and made findings of fact which are clearly improper on a motion for summary judgment.

This case manifests the "mischief" predicted by some members of this Court in *Liberty Lobby, see* 477 U.S. at 268-73 (Rehnquist, J., dissenting), and *Celotex, see* 477 U.S. at 329 (Brennan, J. dissenting), which "mischief" issuance of a writ of certiorari might end or curtail.

III. The decision favorable to Beckman in the Court below rewards abusive discovery tactics which include, *inter alia,* the destruction of evidence and the withholding of evidence which, if available, would have established Beckman's liability.

Nobel sought review in the Court of Appeals of various discovery decisions made by the District Court, including its denial of Nobel's motion for default judgment as to liability based upon Beckman's failure to comply with a Court order compelling the production of copies of

documents admittedly destroyed by Beckman after receipt of Nobel's request for production, or to explain satisfactorily their destruction. Beckman did neither. Nevertheless, this aspect (and related issues) of Nobel's appeal was completely ignored by the Court and summary judgment, based upon Nobel's alleged failure to present sufficient evidence, was affirmed. This, notwithstanding that Beckman (a) admittedly destroyed evidence following receipt of a request for its production *and* after having been ordered by the District Court to produce it; and (b) withheld: (1) documents claimed to be subject to the attorney-client privilege, (2) answers to supplemental interrogatories designed to eliminate all disputes about the relevant product market, (3) two bound volumes authored by Beckman's expert witness which support Nobel's market definition, belatedly produced subject to a copyright two months prior to the summary judgment hearing, and (4) the files of Beckman's President which were withheld for 18 months until after Beckman's marketing hierarchy was deposed, all of which effectively deprived Nobel of essential evidence necessary to defeat Beckman's Motion for Summary Judgment.

Beckman engaged in "scorched earth" discovery tactics despite the entry by the District Court of an elaborate protective order sought by Beckman, but misused by Beckman to harass and frustrate Nobel's counsel in conducting meaningful discovery. With the exception of an award of attorneys' fees and costs to Nobel approximating $30,000, designed to compensate Nobel for trips made by its counsel to three cities to review documents after they were destroyed but prior to the time Beckman admitted their destruction, Beckman suffered no adverse consequences and was ultimately rewarded by having Nobel's case dismissed for lack of the very evidence Beckman had destroyed and/or withheld. An award of costs and attorneys' fees is the slightest of sanctions, and one any antitrust defendant, particularly a defendant faced with

an adverse decision on the facts, would be delighted to pay in order to escape the consequences of its unlawful conduct.

The District Court's refusal to impose appropriately harsh sanctions upon Beckman for its conduct and, more egregiously, the Court of Appeals' total disregard of these issues on appeal, is a clear departure from the accepted and usual course of judicial proceedings, calling for an exercise of this Court's power of supervision. Issuance of the writ in this case would afford the Court an opportunity to censure abusive discovery tactics and declare, as a matter of public policy, that such conduct will not result in success for the guilty litigant.

IV. The decision below conflicts with precedent in this Court concerning the need for relevant product market analysis in cases of a unilateral refusal to deal for an admitted anticompetitive purpose, and having an anticompetitive effect.

It was undisputed that (1) Beckman refused to sell patented analyzers to reagent manufacturers and other competitors, (2) Beckman refused to sell Nobel a patented analyzer because Nobel was a reagent competitor and (3) Beckman's refusal delayed Nobel's entry into the reagent market. Beckman's analyzers were "essential facilities" to Nobel, a reagent manufacturer, without which Nobel could not test its reagent formulations and bring its products to market. *See* note 4, *supra*. The Court found that Beckman's "refusal to deal may at best be viewed merely as one fact supporting Nobel's claim of monopolization, or attempted monopolization," and "the relevant inquiry then becomes whether there has been a violation of Section 2 of the Sherman Act which requires concerted action." (A.34-35). The effect of the lower Court's holding is to mandate relevant product market definition and

analysis even in cases of refusal to deal for an admittedly anti-competitive purpose and having an undisputed anti-competitive effect. Such a decision repudiates three decisions of this Court spanning some sixty years.

In *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927), Kodak refused to sell certain photographic supplies to Southern after Kodak's offer to purchase Southern's business was rejected. Liability was predicated upon Kodak's dominant position in relation to Southern and its predatory conduct in terminating sales to Southern. In *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951), this Court imposed liability upon a newspaper publisher for refusing to accept local advertisements from any advertiser who also used or intended to use a local radio broadcasting company for advertising. In so doing, the *Lorain* Court focused on the predatory nature of the defendant's conduct rather than economic analysis.

More recently, in *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), this Court found the defendant guilty of attempted monopolization under Section 2 of the Sherman Act for refusing (a) to sell power at wholesale to municipalities and/or (b) to transfer power from other wholesalers over its own lines. In so holding, this Court focused, once again, not on any relevant product market analysis, but rather upon the anti-competitive motive of the defendant's conduct, *i.e.*, to destroy its competition.

The essence of these cases is that in the presence of a predatory purpose and the defendant's dominant position *vis a vis* its competitor, considerations of the defendant's power in the whole of the relevant product market are, at most, of secondary importance. This approach is in accord with this Court's first expression of the limited right to refuse to deal in *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919) (emphasis added): "*In the absence of any purpose to create or maintain a monopoly*, the act does not

restrict the long-recognized right of a trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion, as to parties with whom he will deal." As were its tie-ins, Beckman's refusal was an unlawful extension of its lawful monopoly in its patented analyzers into the market for reagents.

Issuance of the writ in this case presents the Court an opportunity to define whether or not a unilateral refusal to sell a patented product in an "essential facilities" context is a *per se* violation of the Sherman Act and, if not, the extent to which it is necessary to engage in relevant product market analysis to gauge its anticompetitive effect.

CONCLUSION

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

EDWARD L. BLANTON, JR.,
BLANTON & MCCLEARY,
Suite 210 Bosley Building,
210 Allegheny Avenue,
Towson, Maryland 21204,
(301) 296-8160,
Attorneys for Petitioner.

CERTIFICATE OF SERVICE

I, Edward L. Blanton, Jr., a member of the Bar of the Supreme Court of the United States and counsel of record for Nobel Scientific Industries, Inc., Petitioner herein, hereby certify that on the ____ day of _____, 1988, pursuant to Rule 28.5(b), Rules of the Supreme Court, I served three (3) copies of the foregoing Petition for Writ of Certiorari on Beckman Instruments, Inc., Respondent herein, by depositing such copies in the United States mail at Towson, Maryland, with first-class postage prepaid, properly addressed to the post office address of Richard L. Horn, Esquire, the above-named Respondent's counsel of record, at Karon, Savikas & Horn, Ltd., 5700 Sears Tower, 233 South Wacker Drive, Chicago, Illinois 60606.

All parties required to be served have been served.

_____

Edward L. Blanton, Jr.
Blanton & McCleary
Suite 210 Bosley Building
210 Allegheny Avenue
Towson, Maryland 21204
(301) 296-8160

Date: _____

APPENDIX A

United States Court of Appeals for the Fourth Circuit

No. 86-2595

Nobel Scientific Industries, Inc.
Plaintiff-Appellant,

v.

Beckman Instruments, Inc.,
Defendant-Appellee.

Appeal from the United States District Court for the District of Maryland at Baltimore
Walter E. Black, Jr., District Judge
(CA-80-3073)

Argued: April 7, 1987 *Decided: October 27, 1987*

Before RUSSELL, PHILLIPS and SPROUSE, Circuit Judges

Edward Lee Blanton, Jr. (Kevin M. McGeady; Blanton & McCleary on brief) for Appellant; Richard L. Horn (Sheldon Karon; George Vernon; Karon, Morrison & Savikas, Ltd.; William W. Cahill, Jr.; Dana N. Pescosolido; Weinberg & Green; William H. May (on brief) for Appellee.

RUSSELL, Circuit Judge:

This is an anti-trust action in which the plaintiff charges that the defendant has monopolized the market in reagents designed for use in analyzers manufactured under patent by the defendant through various acts violative of the Federal anti-trust laws. The analyzers involved are "machines which process blood samples in

other body fluid samples, analyzing them for various chemical components."[1] The defendant is a manufacturer of such machines. Among its machines are the ASTRA 4 and ASTRA 8 analyzers, which have a broader range of capabilities than many analyzers and have a capacity to interrupt routine testing to do a stat or emergency test. The defendant, however, is not the only manufacturer of analyzers; there are a substantial number of manufacturers of such analyzers.

In order to operate any analyzers, various reagents are required. While the basic concept of the reagents used in any analyzer is similar, it seems that each analyzer requires some adjustment in the reagents to be used in its operation. The defendant and the plaintiff are both engaged in the manufacture and sale of reagents for use in the analyzers. The analyzers sold by the defendant are covered by patents; but its reagents are not so covered and it must compete in the market with the reagents of other manufacturers, including the plaintiff, in the sale of the reagents. It is, however, the plaintiff's contention that the defendant had achieved a strong, if not dominant, position in the sale of certain of its analyzers, especially the ASTRA models, and that it had illegally used this position in an attempt to achieve a monopoly in the sale of reagents for use in those machines. It is this alleged attempt to achieve a monopoly in the furnishing of reagents for use in analyzers manufactured by this defendant which is the basis of the claim of the plaintiff.

Following the filing of this action, the parties engaged in extensive discovery proceedings during which all phases of plaintiff's claim were canvassed and the factual bases of its charges were developed. At the completion of the discovery the defendant moved for summary judgment.

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[1] This is the description of the machine as given by the district judge in his opinion.

In disposing of that motion, the district court found that the "parties agree[d] on most of the facts" and that their only differences related to "the legal conclusions to be drawn from those facts." Under those circumstances, the district court concluded that the case was properly one for summary judgment and, in a carefully reasoned opinion, it held that the motion of the defendant for summary judgment should be granted. It accordingly entered judgment in favor of the defendant. The plaintiff has appealed. We affirm the judgment of the district court on the opinion of the district court. *Nobel Scientific Industries, Inc. v. Beckman Instruments, Inc.*, ___ F. Supp. ___ (D. Md. 1986).

AFFIRMED.

United States District Court
District of Maryland

Case No. B80-3073

Baltimore, Maryland
July 11, 1986

Nobel Scientific Industries, Inc.,
Plaintiff,

v.

Beckman Instruments, Inc.,
Defendant.

TRANSCRIPT OF ORAL OPINION
BEFORE THE HONORABLE WALTER E. BLACK, JR.

THE COURT: Plaintiff Nobel Scientific Industries, Inc. brought this antitrust suit against Beckman Instruments, Inc. Beckman has filed a motion for summary judgment

(paper 166) on all aspects of the amended complaint and the issues have been voluminously briefed. Having reviewed the record and heard oral argument today, the Court is convinced that the motion for summary judgment must be granted.

The parties agree on most of the facts but differ on the legal conclusions to be drawn from those facts. The dispute centers around reagents which are used in chemical analyzers. The chemical analyzers are machines which process blood samples or other body fluid samples, analyzing them for various chemical components. These machines are sold to hospitals and laboratories which need to conduct such tests on a frequent basis.

Beckman makes analyzers, including both discrete analyzers and the ASTRA 4 and ASTRA 8, all of which are at issue in this litigation. The discrete, or dedicated analyzers test for specific chemicals. Thus a glucose analyzer solely does testing for glucose. The ASTRA 4 and ASTRA 8, by contrast, have a broader range of capabilities. They can do multi-channel analysis, meaning that they can execute up to five or nine tests, respectively.

In addition the ASTRA machines can interrupt routine testing to do a stat test, a stat test being a priority or emergency test. Indeed the name ASTRA represents this capability since ASTRA is an acronym for "Automated Stat/Routine Analyzer." The ability to do quicker tests with faster results is especially important for emergency care in hospitals.

There are numerous companies that make analyzers and numerous different types of analyzers. Various analyzers exist that can do stat testing and discrete testing. Referring to the deposition of J. Lloyd Johnson, President of J. Lloyd Johnson Associates, Defendant's Appendix I at 126 to 131. In addition, there are many

machines that can do multi-channel analysis, often doing many more tests than the ASTRA machines. Deposition of Johnson at 86 to 88 and 348. For example, the American Monitor Parallel analyzer could run twenty three tests at once. Deposition of Michael Morrison, Product Manager at American Scientific Products, Defendant's Appendix II, at 31. By 1980, there were analyzers on the market from at least fourteen companies other than Beckman. Deposition of Ronald Kovach, Former Vice President and General Manager of Nobel, Defendant's Appendix II, at Exhibit C. Most notable were analyzers made by companies such as Technicon, DuPont, Instrumentation Laboratories and American Monitor. In fact, a market share chart for 1980 shows Beckman selling only 8.9 percent of all chemistry systems.

In order to run any of the tests on the Beckman machines or on other analyzers, various reagents are necessary. Beckman makes a complete line of reagents to do the tests on its analyzers. In addition there are a variety of other companies making reagents and many companies that are solely in the business of making reagents for use in the analyzers of various companies. The tests done are the same for the different analyzers and the reagents are thus somewhat similar. While the reagents have to be adjusted, the basic knowledge required to make them remains the same for all the machines.

Beckman has a variety of option plans for the purchase of instruments, reagents, repair service and supplies. None are required and many are similarly in use by other companies. First and most important is the "Answer-Pak" program. This is a rental program, under which Beckman supplies the necessary analyzer, reagents and service in return for a monthly rental payment based on the number of tests done on the machine. Such rental programs are very common in the industry. Deposition of Peter

Blanchard, American Scientific Products, Defendant's Appendix I, at 48 to 50; Deposition of Douglas Johnson, Product Manager for American Technical System, Defendant's Appendix I, at 30 to 31. After 1983, due to unrelated legal developments, the Answer-Pak system was largely superseded by a "metered titled lease" program. This works in the same manner as the Answer-Pak except that over time, the customer acquires an equity interest in the analyzer. Overall, between 45 and 50 percent of those acquiring an ASTRA analyzer have used one of these rental systems. Defendant's Supplemental Answers to Plaintiff's First Set of Interrogatories. See also Deposition of Michael Whelan of Beckman, Defendant's Appendix II, at 78.

Other customers make use of cash discount programs. The ESP program, standing for Essential Supplies Planning, gives a cash discount of up to 25 percent off the list price on reagents. Another program, the CDP or Competitive Data Profile program, authorizes higher cash discounts for specific accounts in order to meet the prices offered by reagent competitors.

The ESP + 10 program is similar to the ESP program. ESP + 10, however, offers up to a 35 percent discount off the list price of future purchases of any Beckman goods or services. This is an "in kind" discount and can be used to purchase equipment or services, as well as reagents.

Beckman also offers various other services to its instrument and reagent customers. These include reduced rates on service contracts, seminars on using the equipment and a hotline to solve technical problems. There is some dispute as to the availability of these services, at least without paying a fee, for those who do not use Beckman reagents.

Beckman is, however, not the only seller of reagents for its analyzers. As stated before, many companies are in the

business of making reagents for analyzers. Nobel is one of those competing companies and one of several companies, including also Hi-Chem, Fisher Scientific, and others that manufacture reagents specifically for use in the Beckman analyzers. Despite the presence of these various reagent companies, Beckman has allegedly been able to retain a market share of more than 95 percent of the reagents used with its ASTRA analyzers and more than 85 percent of the reagents used with the Beckman discrete analyzers.

Nobel alleges that this is monopolization of the reagent market in violation of the Sherman Act. In addition, Nobel alleges that the reason Beckman has so much of the reagent business for its analyzers is that there are tying agreements in violation of the Clayton Act. Nobel says that the Beckman analyzers are a unique and valued commodity, which constitute a market unto themselves. Beckman has allegedly tied purchase of its analyzers or other services to purchase of Beckman reagents through the various discounts and package rental plans. Nobel claims that Beckman has market power over analyzers which it has used to force its customers to buy its reagents. Plaintiff also points to a refusal of Beckman to sell an ASTRA analyzer to Nobel and claims that this constitutes a refusal to deal in violation of the Sherman Act.

Summary judgment can only be granted under Rule 56 of the Federal Rules of Civil Procedure if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 467 (1962). Summary judgment is used sparingly in complex antitrust cases, citing *Poller* at page 473. Nevertheless, it is appropriate at times and there must be sufficient evidence supporting the complaint to warrant a lengthy jury trial. *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 at 289-90 (1968); *Terry's Floor Fashions,*

Inc. v. Burlington Industries, Inc., 763 F.2d 604 at 610 (4th Circuit, 1985); *Alphin Aircraft, Inc. v. Henson*, 1984-2 Trade Cases (CCH) Section 66, 161 at page 66, 496 (D. Md. 1984). In the most recent antitrust case in the United States Supreme Court, the opinion emphasizes that summary judgment can be appropriate in antitrust litigation, in particular if the claim "makes no economic sense." *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 106 S. Ct. 1348 at 1356 (1986).

In an opinion of the Supreme Court on June 25th of this year, the Court further stated that "the plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Cartrett*, 54 U.S. Law Week 4775 at 4777 (1986) and see also *Anderson v. Liberty Lobby, Inc.*, 54 U.S. Law Week 4755 (1986).

It should also be noted that summary judgment is appropriate for litigation where definition of the relevant product market is at issue. When a Court finds that the correct market definition precludes plaintiff's claims summary judgment should be granted. *Stearns v. Genrad, Inc.*, 752 F.2d 942 at 946 & 7 (4th Circuit 1984).

As noted before, the dispute at this stage of the litigation is not factual. Few if any facts are disputed. Rather the parties differ on the legal conclusion to be drawn from the facts and whether the facts as given constitute an antitrust violation.

Nobel first alleges that Beckman has a monopoly of the reagent business, or attempted to monopolize that business, in violation of Section 2 of the Sherman Act. Section 2 states that "every person who shall monopolize

or attempt to monopolize any part of the trade or commerce among the several States" shall be guilty of an antitrust violation.

The classic formulation of the standard for finding a monopoly is set forth in *United States v. Grinnell Corp.*, 384 U.S. 563 at 570 & 71 (1966).

> "The offense of monopoly under Section 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen or historic accident."

The Court is convinced that if monopoly power exists, then genuine issues of material fact exist as to the second element, acts taken to acquire or maintain that power. Nobel has alleged that Beckman refused to sell an instrument to them, admittedly to try and avoid reagent competition. Deposition of Larry Cohen, Beckman Marketing Specialist, Defendant's Appendix I at 89. In addition, Nobel says that customers were told the hotline service would be discontinued if they stopped using Beckman reagents. Deposition of M. Elizabeth McGee, Clinical Laboratory Administrator, St. Francis Hospital, Plaintiff's Appendix II at 14-20. There are also allegations that Beckman tried to "botch" test results of other reagents on Beckman instruments. Deposition of Kevin Keene, Beckman Marketing Specialist, Plaintiff's Appendix II at Exhibit 1. In short there are issues of fact as to whether Beckman's actions, in order to maintain its sales, were proper.

This does not end the inquiry, however, because in order to be liable under Section 2, Beckman must have, in fact, possessed monopoly power in the reagent market. If monopoly power did not exist, then Beckman's acts, while arguably harsh or overly aggressive, would not subject Beckman to liability.

A similar analysis holds for an attempt to monopolize. "There is no attempt to monopolize within the prohibition of Section 2 of the Sherman Act unless there is both an intent to monopolize and a 'dangerous probability' that an actual monopoly will be achieved." *White Bag Co. v. International Paper Co.*, 579 F.2d 1384, 1387 (4th Circuit 1974); *Satellite Television v. Continental Cablevision*, 714 F.2d 351, 358 (4th Circuit 1983). Nobel has raised issues of fact, by virtue of its depositions, as to what was Beckman's intent. Unless, however, the market is such that monopoly might be achieved, there can be no liability. Again analysis of the relevant reagent market is most important for purposes of this summary judgment motion.

The motion to dismiss the Section 2 claim therefore relies on market definition, in order to see whether monopoly power exists or is a dangerous probability. In general "the plaintiff in an antitrust case bears the burden of proof on the issue of the relevant product and geographic markets." *Satellite Television*, 714 F.2d at 355. There is no debate over the relevant geographic market which presumably is the whole United States. What is important in this litigation is instead the proper product market.

Market definition has often been the subject of litigation. In *United States v. E. I. duPont de Nemours and Company*, 351 U.S. 377 (1956), a leading case, the Supreme Court held that cellophane did not constitute a market to itself. The market instead was flexible packaging materials because other wrapping papers, while not identical, could substitute for cellophane. "In considering what is the relevant market for determining the control of price and competition, no more definite rule can be declared than that commodities reasonably interchangeable by consumers for the same purposes make up that 'part of the trade of commerce', monopolization of which may be illegal." Quoting from 395. In addition, the

Court noted that the cross-elasticity of demand was an important factor to be considered. P. 394. In other words, if the price of cellophane were to rise too high, consumers would switch their demand over to another form of wrapping material and sales of cellophane would decline. In a monopolistic market, by contrast, cellophane prices could rise without an effect on demand for them.

Use of the term "product market" has specific connotations for antitrust purposes. Much confusion in this litigation seems to have arisen from the casual use by hospitals and by reagent manufacturers and businessmen, of the term "market" in their ordinary business reports and strategy papers. Product markets for antitrust analysis depend on cross-elasticity and interchangeability, and so the fact that a company may refer to a "market" does not necessarily mean that its reference will be to a market for purposes of the Sherman Act.

Nobel argues that the market must be defined narrowly in terms of seven specified chemical tests done on a stat basis and must therefore, in essence, be the market of reagent solely for use on the Beckman instruments. Nobel argues that the Beckman machine is unique based on the ability of the Beckman machines to do stat testing, to interrupt routine tests for stat tests and to do seven specified chemistry tests for glucose, BUN, creatinine, sodium, potassium, chloride, and bicarbonate, that Nobel claims are most often requested. Nobel claims that there is one market for instruments which consists of merely the Beckman instruments and that there is a separate market for reagents for the Beckman instruments.

This is an extremely narrow market definition, essentially limited to the products of one company. Under a broader market definition, including other companies and other analyzers, or including more than just stat testing on seven chemicals, there can be no claim of

monopoly or of attempted monopoly. If other analyzers compete effectively with the Beckman analyzers, then the relevant product market must include the sale of reagents for those analyzers as well. As a result, Beckman's market share or potential market share, would not give rise to liability for monopolization or attempted monopoly of the reagent market.

The parties do not debate the facts. They merely argue as a matter of law whether the facts as given mandate a narrow market definition, or a broader one. The Court is convinced that the market cannot be defined as narrowly as Nobel would desire. There is no question that the ASTRA analyzers were very successful and are considered among the best in the industry. Nevertheless, there is uncontradicted evidence that other machines existed in the past and exist now that compete with the ASTRA instruments and that do the same functions as the Beckman analyzers. In addition, there is no market consisting merely of stat testing for the seven chemicals. In general customers can choose between various alternative machines or combinations of machines to do various functions and if the price of reagents is too high, then laboratories will switch to other analyzers in order to cut costs. The reagent market therefore must be viewed as including the market of reagents for various competing analyzers and chemical tests and cannot just be limited to the Beckman machines.

The cost and availability of the reagents and of other services needed to run an analyzer are important factors for a hospital or laboratory in deciding what machine to purchase. Deposition of Bruce Hamilton, Johns Hopkins University, Defendant's Appendix I, at 45 & 6 and 75 & 6; Deposition of Rosemary Hines, Chemistry Laboratory Manager at Francis Scott Key Medical Center, Defendant's Appendix I, at 21 & 22. For example, as Dr. Hamilton, an expert for Nobel, stated:

> Q. Would there be a relationship which would mean that the higher the price of the reagents, the fewer sales of instruments could be expected? A. Yes.
>
> Q. And conversely, the lower the price of the reagent, the greater the number of sales of the instrument? A. Correct.
>
> Q. So it is clear that the cost of reagents is something that a hospital considers when it looks at instrument acquisition? A. That is my understanding, yes.

The uncontradicted testimony indicates that if the price of reagents or other services rises too high, then the hospitals and laboratories will buy other instruments. One hospital specifically rejected a Kodak analyzer due to high reagent prices. Deposition of H. Patrick Coveault, St. Francis Hospital, Defendant's Appendix I, at 27. This shows that there is interchangeability of the chemical analyzers and that the market is responsive to changes in prices of reagents. If the Beckman reagents cost too much, customers will cease using Beckman machines.

In addition, the Beckman analyzers, while highly regarded, are not so unique that they face no competition and cannot be replaced by other machines. Nobel stresses that the Beckman analyzers do stat testing, can interrupt routine tests for stat tests and can test for the seven specified chemicals. None of these capabilities is unique.

Deposition testimony indicates various analyzers in competition with the ASTRA machines such as the duPont ACA system. Deposition of Cohen at 88. A 1980 chart indicates that Beckman only sold 8.9 percent of all chemistry systems and that at least fourteen companies sold such systems. Deposition of Kovach at Exhibit C. While the Beckman machines can perform stat tests, other machines can also do this and some, such as the American Monitor Parallel, are faster. Deposition of Gayden

Gauthier of Beckman, Defendant's Appendix I, at 17. In addition, there are various machines that can interrupt routine testing to do stat testing. Uncontradicted testimony states that:

> Q. But it has the ability to interrupt the routine testing and give you a stat if one is needed? A. Yes.
>
> Q. Are there any other instruments on the market that had that capability in that period, 1979 to 1983? A. Yes.
>
> Q. What other instruments? A. DuPont, ACA, Yellow Springs Instrument had an analyzer, stat analyzers. You're talking specifically about the stat interrupt capability?
>
> Q. Yes, sir. A. '83; I.L. I.L. had a system that would do it, Instrumentation Laboratories.
>
> Q. And you don't know of any period of time when the ASTRA was the only instrument that offered that ability to do seven different chemistries on both a routine and stat basis? A. No.

Deposition of Harold Peper of Beckman, Defendant's Appendix II, at 112 & 13. Other testimony supports this. Deposition of Patricia Sisson of Beckman, Defendant's Appendix II, at 34 and Deposition of Frederick Herr of Beckman, Defendant's Supplemental Appendix at 98.

It is also instructive to look at the various studies and memoranda which both parties have presented to the Court. These often have comparisons of various analyzers, thus pointing out that the ASTRA is not in a separate market and that other machines are competing for the same business. A hospital, for example, will compare the merits of the ASTRA versus other machines. See, for example, the deposition of Dale Thompson, Defendant's Appendix II, at Exhibit 1; Deposition of Gary Cabana, Veteran's Administration Medical Center, Defendant's

Appendix I, at 31; Deposition of Coveault at 26 & 7. In addition, it is suggested that many hospitals and laboratories own several analyzers in order to do varied tests on many samples at once. Therefore, combinations of equipment might be sought by a customer and not one analyzer to solve all testing needs. One hospital study, for example, recommends buying both an ASTRA 8 and also analyzers made by Abbott Laboratories. Depositions of Thompson at Exhibit 1. All of these facts show that the Beckman analyzer is not its own separate market.

Defining the product market in terms of the seven specified chemical tests is also overly restrictive. The evidence shows that many machines can do many more tests than the ASTRA 8. Machines doing twenty or more tests are routine. In addition, few, if any, of the analyzers available are specifically limited to doing the seven named tests. Some analyzers are valued for the number of tests they can do, some for their speed, some for their cost, and some for other features. All of the machines, however, compete for the same contracts and businesses. Therefore one cannot separate out the competition to sell reagents for only these seven tests. Reagent competition is for selling reagents for any of the tests that the machines can run. To sell reagents for an ASTRA 8, which can do nine tests, a company must sell reagents for all of the desired tests and not just for seven of them.

The Court would also note that if the market were to be defined merely in terms of the seven named, then the discrete analyzers and the ASTRA 4 might not be in the product market. Only the ASTRA 8 can do all seven of the tests at the same time. Plaintiff nowhere suggests that its complaint is limited to the ASTRA 8.

Nobel, at times, is attempting to define the market as a subset of certain functions the ASTRA machine can perform. Thus Nobel says that there is a separate market

for stat testing, or stat interrupt testing, of the seven specified chemicals, ignoring the fact that the exact same ASTRA machine also at the same time does routine testing, and also tests for other chemicals besides the specified seven. In general, this is true for all analyzers. The same machines do stat testing as do routine testing, and do tests on the seven specified chemicals as for many other chemicals. A machine would be evaluated in the industry for its overall qualities in all areas, or as part of a system combined with other analyzers and not merely on one aspect alone. In addition, while some tests may be more common, a lab may need the capability to do up to a hundred or more different types of tests. The evidence in the record thus establishes no basis for a market consisting of only one of various functions the Beckman analyzer can perform, ignoring all other work done by the machine.

Just as there is no separate market of analyzers doing stat testing on the seven chemicals, there can be no separate market of reagents in this area. It is agreed that the reagents used to do the stat tests are the same as for the routine tests, so that the reagent markets cannot be distinguished in theory or in practice. The tests are the same and only the timing differs. In addition, there is no evidence, as noted before, that reagent companies limit themselves to selling reagents for only seven tests. The reagent market must be broader.

Nobel's monopoly claim "makes no economic sense," as it attempts to set out a separate market for reagents for the Beckman equipment. The market cannot be defined so narrowly. All evidence suggests that different machines had different characteristics and different advantages and disadvantages and that they competed against each other in the eyes of the industry. The evidence is also uncontradicted that other machines had the same qualities, such as stat interrupt capability that Nobel

claims are unique and distinctive in the Beckman analyzers.

Given this competition in the analyzer market, the reagent market, which seems to be distinct, must include reagents for all competing analyzers and not just for the Beckman instruments. This is emphasized by the fact that if the overall cost of operating an analyzer, whether due to reagent cost, service costs or otherwise, is too high, then a hospital or lab will switch to purchase of another company's equipment. In addition, the same chemicals are used for stat as for routine testing and the reagent companies do not limit themselves to only making seven reagents. Interchangeability and the cross elasticity of demand test, have been met.

The fact that Beckman had a high percentage of sales of reagents for its own analyzers is not unusual. The manufacturer of the analyzer generally held an advantage in the reagent market for its own machine, since it is most convenient to buy from the manufacturer and seems a safe alternative. Deposition of Blanchard at 32. As noted by Vincent Mihalik of American Hospital Supply Corporation, which is associated with Nobel,

> A. Most customers would prefer to buy the reagents of the manufacturer who makes the instrument.
>
> Q. Why is that? A. Less concern over if they have a problem, having to track down whether it's an instrument problem or reagent problem.

Deposition of Vincent Mihalik, Defendant's Appendix II at 11-12. Thus while Beckman and other manufacturers may have often done well selling reagents for their machines, there would at a minimum be competition over what machine to use, based on the overall costs of an analyzer, including the reagent costs.

It is also noteworthy that there is overwhelming evidence that the market for reagents in fact had much competitive activity, including price competition, belying any claim of monopoly or dangerous possibility of monopoly. Beckman dominated sales of reagents for its machines but the presence of strong competitive pressures suggests that the market may have been broader. While perhaps not determinative, the evidence is worth noting.

There are numerous companies, perhaps thirty or more, marketing reagents, and numerous companies that include reagents for the Beckman machines in their line of products. Deposition of Blanchard at 22-29. Reagents for one analyzer can be readily adapted for use in another machine. Deposition of Ronald Pilchik of Nobel, Defendant's Appendix II, at 12-15; Deposition of Morrison at 61 & 74. The companies making reagents for Beckman analyzers include companies such as Nobel, Hi Chem and Fisher.

These companies seem to pose a competitive threat to Beckman. A Vice President of Marketing for a company selling Nobel reagents stated that "Hi-Chem is already in the marketplace doing a very good job in competing with Beckman. Nobel and Hi-Chem both do compete very well with Beckman." Deposition of Vincent Mihalik, Defendant's Supplemental Appendix at 89. In addition, internal Beckman memoranda stress competitive pressures, stating that "the ASTRA reagent marketplace is extremely competitive," and noting "the stiff competition that has crept upon us in recent weeks." Deposition of Dennis Gorman, Plaintiff's Appendix I; Deposition of Philip Shugart, Plaintiff's Appendix II at Exhibit 5. While the memoranda standing alone would not be conclusive, along with other evidence they suggest the pressures in the reagent business.

Price competition is intense. Reagent companies are selling the chemicals for large discounts off of list price. A 55 to 60 percent discount by Nobel was "not extraordinary." Deposition of Thomas Carey of Nobel, Defendant's Appendix I, at 589-90. Other indications are that discounts by Nobel have been 70 to 82 percent off list price and that other companies discount 60-80 percent off of list. See, for example, the deposition of Gregory Gerhardt, Johns Hopkins University, Defendant's Appendix I at Exhibit 3; Deposition of Roger Brown of Beckman, Plaintiff's Exhibit I at Exhibit 12, pages 3 & 4 and Deposition of Gauthier at Volume I, Exhibit 6.

There is also evidence of customers switching service from Beckman reagents to those of Nobel or other competititors for price and other reasons. One laboratory supervisor stated that his hospital had switched to Nobel reagents largely because "I felt I got better service" from Nobel. Deposition of Gary Cabana, Veteran's Administration Medical Center, Defendant's Appendix I, at 40 & 41. One Beckman memorandum stated that "agreements lost to competitive reagents are increasing significantly," nearly quadrupling over the course of one year. Deposition of Al Muense, Defendant's Appendix II, at Exhibit 3.

Beckman, in response, also had to cut prices. The CDP program was specifically directed at lower reagent prices of competitors and allowed discounts for competitive accounts above the usual 35 percent maximum. Discounts by Beckman exist at least up to 65 percent off of list price. Deposition of Richard Cook of Beckman, Defendant's Appendix I, at 14.

There is no evidence of predatory pricing and of Beckman selling below its cost to try and dispose of competitors. In addition, while Beckman's list price might have been higher, it increasingly lowered its actual selling

price to that of its competition, not typical of a company with monopoly power.

A Court must be skeptical of attempts to narrow the market merely to the products of the defendant. "In defining the relevant market, the Court must look beyond the particular commodity produced by an alleged monopolist because the relevant product market for determining monopoly power or the threat of monopoly control depends upon the availability of alternative commodities for buyers." *Fount-Wip, Inc. v. Reddi-Wip, Inc.*, 568 F.2d 1296, 1301 (9th Circuit 1978). The "natural monopoly" of a manufacturer in his own products is not an antitrust violation. *Spectrofuge Corp. v. Beckman Instruments, Inc.*, 575 F.2d 256 at 282 (5th Circuit 1978), *cert. denied* 440 U.S. 939 (1979).

Many cases have rejected a narrow definition of product market, limited to one commodity. *See for example, Domed Stadium Hotel, Inc. v. Holiday Inns, Inc.*, 732 F.2d 480 (5th Circuit 1984) (hotel rooms); *Spectrofuge Corp. v. Beckman Instruments, Inc.*, relating to centerfuges; *Reisner v. General Motors Corp.*, 511 F. Supp. 1167 & 1179 (S.D. N.Y. 1981), *affirmed* 671 F.2d 91 (2d Cir.), *cert. denied* 459 U.S. 858 (1982), involving automobiles; and *Cal Distributing Co. v. Bay Distributors, Inc.*, 337 F. Supp. 1154 at 1159 & 9 (M.D. Fla. 1971), involving wines.

In addition, two courts have rejected the argument that IBM plug compatible computer equipment constituted a relevant product market. *Telex Corp. v. IBM*, 510 F.2d 894 (10th Cir. 1975), *cert. denied* 423 U.S. 802 (1975); *ILC Peripherals Leasing Corp. v. IBM*, 636 F.2d 1188 (9th Cir. 1980), *cert. denied* 452 U.S. 972 (1981). Just as items to be used in the IBM computers are not a separate market, merely because the IBM computers are popular, so too the reagents to be used in the Beckman instruments should not be a separate market. The arguments are parallel, as should be the result.

Another oft cited case is *General Business Systems v. North American Philips Corp.*, 699 F.2d 965, 971-75 (9th Cir. 1983), which is discussed in the briefs at greater length. This case follows the same reasoning and held that computer cards to be used in a Philips computer system were not a separate market. If the cost of the cards increased too much, then customers could and would switch to use of other computers. This again is similar to the analyzers, because increased costs of the reagents can cause customers to buy other instruments.

There are limited exceptions to the rule against having a market that is related to only one product. "The exception applies when the manufacturer of the unique product uses his control over one market, or level of competition, to eliminate competition at another level or submarket." *Domed Stadium Hotel*, 732 F.2d at pages 488 and 9. This exception is rarely applied, as seen in the cases already noted. In addition, there is no evidence in this case that the Beckman analyzers are so unique, and have such control over the instrumentation market, that the reagents for those analyzers forms a distinct product market. To the contrary, many consumers consider and choose machines other than those of Beckman. They balance the merits of various machines and will choose other analyzers if reagent costs or other costs are too high.

The relevant product market must include reagents for machines other than the Beckman analyzers. Many analyzers are in competition, and are reasonably interchangeable by hospitals and labs. The reagent companies make reagents for different analyzers and there is no separate market limited to the reagents for the Beckman machines.

Plaintiff also alleges that there is a violation of Section 1 of the Sherman Act, but devotes little attention in its complaint or briefs to this issue. Section 1 requires a

"contract, combination or conspiracy, in restraint of trade or commerce." In addition to showing concerted action, and not merely unilateral acts,

> a successful plaintiff must also show: (1) that the conspiracy produced adverse, anti-competitive effects within the relevant product and geographic market; (2) that the objects of and conduct pursuant to the conspiracy were illegal; and (3) that the plaintiff was injured as a proximate result of the conspiracy.

Terry's Floor Fashions, Inc. v. Burlington Industries, Inc., 763 F.2d 604 at 610, note 10 (4th Cir. 1985).

Nobel's allegations are all directed at unilateral action by Beckman to try and secure and maintain reagent business. While the object of Beckman's actions were hospitals and laboratories, there was no concerted action with those customers. The customers were, at worst, merely victims, and the fact that a company agreed to buy reagents from Beckman cannot, by itself, make that company part of an illegal combination or conspiracy. While Nobel makes conclusory assertions of concerted action, the Court finds that the only evidence in the record is of unilateral action.

The Answer Pak contracts, and contracts for service or reagents can, however, arguably be viewed as illegal tying arrangements, subject to the strictures of Section 1. Since Section 3 of the Clayton Act, by its terms, only applies to tying of goods, Section 1 of the Sherman Act has been used to stop tying of services, such as the hotline and service contract tying alleged here. Therefore, to the extent there may be a violation of Section 1 of the Sherman Act, it would be through an illegal tying arrangement. The analysis is the same as for the Clayton Act and both will therefore be discussed together.

Section 3 of the Clayton Act applies to "goods, wares, merchandise, machinery, supplies or other commodities,

whether patented or unpatented." It therefore applies to the Beckman instruments, reagents, and replacement parts but not to the service contracts. The section goes on to say that for such items,

> It shall be unlawful for any person to lease or make a sale or contract for sale for use, consumption, or resale, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the products of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

This language forbids tying arrangements between two products. As the Supreme Court set out in *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 5 & 6 (1958),

> a tying arrangement may be defined as an agreement by a party to sell one product but only on the condition that the buyer also purchases a different or tied product. They are unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a 'not insubstantial' amount of interstate commerce is affected.

There need not be an explicit condition that the buyer of the tying product buy the tied product. "Separate availability will not preclude antitrust liability where defendant has established its pricing policy in such a way that the only viable economic option is to purchase the tying and tied products in a single package." *Ways and Means, Inc. v. IVAC Corp.*, 506 F. Supp. 697, 701 (N.D. Cal. 1979), *affirmed* 638 F.2d 143 (9th Cir.), *cert. denied* 454 U.S. 895 (1981).

Beckman sells its ASTRA 4, ASTRA 8 and discrete analyzers separate from the reagents and service plans. Nobel alleges, however, that even though buying the reagents is not required, the price structure on the Answer Pak and the other discounts makes any other option not feasible.

For a tying arrangement to exist, there must be both a tying product and a tied product. The tying product in this litigation should be the Beckman analyzers, and the tied product the reagents.

Nobel seems to also allege that the service contracts, parts, hotline services, or other related items, might be the tying products, although the complaint itself does not state this contention nor give any factual support for it. The problem with using these other items as the tying product is that they have no market power independent of that for the analyzers. There is no evidence of consumer demand for these items and thus of their market power or leverage, independent of consumer desire to purchase analyzers. At best, the market power is derivative, and would be equal to that for the machine.

While the Court feels that only the instruments can be the true tying product, the analysis would be the same even if other tying products are involved. The analysis to follow is therefore meant, even when not stated explicitly, to be equally applicable no matter which Beckman product is involved.

It should also be noted that the reagents can be the only tied product. Nobel does not allege that it competes to supply service contracts or hotline service to users of Beckman instruments. There is no allegation or evidence of a substantial lessening of competition, except perhaps as regards makers of reagents. This is the only posible allegation. There can be no tie to service contracts to parts or to hotline service.

Therefore, at a minimum, any alleged tying must involve a combination of reagents with either instruments or some other Beckman item, such as through the Answer Pak or the ESP + 10 service. Mere cash discounts on reagents, such as the CDP program, or the ESP program, which does not allow "in kind" discounts, cannot constitute tying.

There are various reasons that Beckman's actions do not, as a matter of law, constitute illegal tie-ins. First, no tying arrangements exists if there is freedom to choose whether to buy the two products separately or as a unit. "Where the buyer is free to take either product by itself, there is no tying problem even though the seller may also offer the two items as a unit at a single price." *Northern Pacific Railway*, 356 U.S. at 6 n.4. Thus the Supreme Court has consistently approved of discount packages and price competition through such sales.

> If each of the products may be purchased separately in a competitive market, one seller's decision to sell the two in a single package imposes no unreasonable restraint on either market, particularly if competing suppliers are free to sell either the entire package or its several parts. Buyers often find package sales attractive; a seller's decision to offer such packages can merely be an attempt to compete effectively.

Jefferson Parish Hospital District No. 2 v. Hyde, 104 S. Ct. 1551, 1558 (1984).

Here the evidence is undisputed that the items could be bought separately. There are also various package deals available by Beckman and by other suppliers, and different packages are priced to compete with various needs. There is, however, no evidence of any one package having dominance or of package purchases being the only viable option. For example, of all the analyzer business done by Beckman, only 45-50 percent involve Answer Pak

or other rental programs. Other customers use another reagent program or buy their reagents from another supplier. In *Ways and Means v. IVAC,* another medical supply case, the court found that when 25 percent of all purchases were made outside of an alleged tying program, then as a matter of law, separate purchase of the products was a viable alternative and no tying existed. That's a citation to pages 702 & 3. By this reasoning, no one discount program by Beckman, standing alone, can be the tie-in, and the variety of options available to customers suggests that even as a group, there is no tie, but rather merely a range of competitive alternatives.

The evidence points to the fact that the discount plans were "merely an attempt to compete effectively." *Jefferson Parish,* at 1558. "The essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms." This essential characteristic is not present. In this case, the customers definitely want to and have to purchase reagents. In addition, if they want to purchase them elsewhere, they can, and there are many different discount plans available by which to purchase the reagents.

It was noted previously that the market for reagents is characterized by frequent price cuts, and discounts of 60 to 70 percent off of Beckman's list price. The net result is that the customers buy reagents more cheaply. Nobel argues that for the Beckman package discounts, the package costs less than buying the individual items separately. While this may at times be true, this is not crucial. First, there is no evidence of predatory pricing, but only of Beckman trying to meet the prices of its competition. In addition, the packages themselves are in competition with other packages.

Beckman is not the only company offering package deals involving reagents and other goods. Most other analyzer companies also have rental programs through which the customer can get a whole chemistry system. In addition, the reagent companies offer package deals similar to those offered by Beckman. The record shows, for example, that the reagent company, Scientific Products, offered a discount program where purchases of reagents resulted in credits towards acquiring other reagents, instruments, or other products. Deposition of Mihalik at 33 & 4. In this way, Scientific Products managed to take an account away from Beckman by offering an Apple computer in return for purchasing Nobel reagents. Deposition of Cabana at 39-41. Alpkem also offers service and parts, as well as reagents and instruments, to its customers. Deposition of Mihalik at Ex. 12. Reiss Technical Services, as well as Laboratory Performance Specialists, did service on ASTRA analyzers. Deposition of Arthur Smith, Defendant's Supp. App., at 40. Beckman's package plans, therefore, are in competition with other packages from other manufacturers, who want to take away Beckman's business.

The fact that a package is inexpensive does not mean that it is unlawful. It may merely be a sign of effective competition. Nobel disputes the low price of service contracts to those using Beckman reagents and the easier use of the hotline service. Beckman offers undisputed evidence, however, that it was easier to provide hotline and other service to those using Beckman reagents, because Beckman knew more intimately the characteristics of its own reagents. See, for example, the Deposition of Gayden Gauthier at Vol. I, pp. 23-7.

The characteristics of the different discount plans offered by Beckman also suggests that they are done for competitive reasons and not to use market power over analyzers, parts, or service, to force purchase of Beckman reagents. Several of the package deals, in particular the

CDP and ESP plans, only involve purchase of reagents and therefore, cannot be an illegal tie. The ESP + 10 plan involves "in kind" discounts on future purchases of any Beckman products, but the discounts can, if desired, be used solely to purchase more reagents. Therefore, the ESP + 10 program might only involve one product, negating any suggestion of a possible tie.

The Answer Pak program and metered titled lease plans involve rental payments on a per test basis. The purchase is of a package, including the analyzer, reagents and necessary service. Since the components are not paid for separately, these plans would probably cater to different buyers, for whom per test payments are more economical. Again, most analyzer companies offer similar programs and only about half the ASTRA customers use one of these Beckman plans.

Finally, the ASTRA Users Club includes hotline service, newsletters, seminars, and other benefits, but no discounts on purchases. It is an optional program and can only be joined after purchases of Beckman equipment have already been made.

Overall, the nature of Beckman's discount plans, as well as the presence of competition for the reagent business, and the frequent price cuts by both Beckman and by Nobel and others, strongly suggest that no tying arrangement is or was occurring. Instead, Beckman's actions must be seen as competitive with the actions of other companies, and the discount plans themselves have no aspects that can be considered unlawful.

There is also no tying because there is no tying product with sufficient economic power to "substantially lessen competition or tend to create a monopoly" in the reagent market. In order for an invalid tie to exist, Beckman must have had sufficient economic power with regard to the instruments or other items to cause purchases of reagents.

This once again relates to market definition, and an analysis of what is the product market for the Beckman machines.

The Court, at the outset, rejects plaintiff's claim that no evidence of economic power is necessary to establish tying under Section 3 of the Clayton Act, in support of which they cite *Advance Business Systems and Supply Co. v. SCM Corp.* 415 F.2d 55, 62 (4th Cir. 1969). Plaintiff argues that if a "not insubstantial" amount of commerce is restrained, then the tying is unlawful without further inquiry. *Times-Picayune Publishing Co. v. United States,* 345 U.S. 594, 608 & 9 (1953).

This argument runs into various problems. First, *Advance Business Sytems* assumes that the alleged tying is, in fact, restraining the commerce it affects, because if not, the Clayton Act could not be violated. Such restraint of commerce does not always occur, however, since at times, tie-ins, through package sales or discounts, can be offered as themselves a form of price competition. Therefore, the *Advance Business Systems* analysis can only be effective for times when a restraint on commerce can be assumed.

The Supreme Court has noted this in its most recent pronouncements in the tying field. In *United States Steel Corp. v. Fortner Enterprises, Inc.,* 429 U.S. 610 (1977) (known as *Fortner II*), the Court addressed *Advance Business Systems* directly, and held that economic power need not be shown only if there is "the absence of other explanations for the willingness of buyers to purchase the package." *Fortner II,* 429 U.S. at 618 n.10. the Court noted that "use of the tie-in in this case can be explained as a form of price competition in the tied product," and that as a result an economic power analysis was necessary. Similarly Beckman argues that its sales were a form of price competition, and other reasons, such as convenience

of dealing with the equipment manufacturer, or quality of product, might explain why hospitals or laboratories would buy Beckman reagents. Since other reasons to buy the Beckman reagents are apparent, purchases of a package cannot be condemned without analysis. It is only when no other explanation exists for purchases of the tied product that analysis of market power can be avoided.

This follows from the Clayton Act itself, which required that the effect of the tying "may be to substantially lessen competition or tend to create a monopoly." This explicitly requires some analysis of market power to see if competition is, in fact, being lessened or increased. A lessening of competition cannot be presumed from the sale of two products together, unless there is no other reason the tied product would be purchased. Recent cases have recognized these ideas, and rejected any general application of *Advance Business Systems*. See, for example, *Spartan Grain & Mill Co. v. Ayers*, 581 F.2d 419, 428 (5th Cir. 1978), *cert. denied* 444 U.S. 831 (1979).

The most recent tying case by the Supreme Court, although brought under Section 1 of the Sherman Act, also supports this position. In *Jefferson Parish*, the Court stated that "with respect to the definition of tying, the standards used by the two statutes, the Sherman and Clayton Acts, are the same." *Id.* at 1564 n.39. The Court held that where the existence of market power, or leverage, which would "force a purchaser to do something that he would not do in a competitive market" "is probable", then there could be per se condemnation of a tying arrangement. *Id.* at 1559 & 60. Nevertheless, this still requires evidence of market power and actions are not unlawful merely because a "non insubstantial" amount of commerce is affected.

The result is that a Court must inquire into market power, or leverage, before condemning a tying ar-

rangement. This, in turn, requires an analysis of the relevant product market. "In sum, any inquiry into the validity of a tying arrangement must focus on the market or markets in which the two products are sold", quoting from the opinion at 1561.

> Decisions do not require that the defendant have a monopoly or even a dominant position throughout the market for the tying product. They do, however, focus attention on the question whether the seller has the power, within the market for the tying product, to raise prices or to require purchasers to accept burdensome terms that could not be exacted in a completely competitive market. In short, the question is whether the seller has some advantage not shared by his competitors in the market for the tying product.

Fortner II, 429 U.S. at 620.

The prior analysis of the market for analyzers indicates that Beckman does not have such power. There are many machines that are interchangeable with the Beckman analyzers. If the price of the Beckman machines or of the supporting services for those machines rise too high, then competitive analyzers will be used. While the Beckman machine may be popular, this does not translate into an advantage over competitors that can be used to raise prices or cause acceptance of burdensome terms. No legally valid market can exist, on the undisputed facts, in which Beckman can exercise such economic power.

There is also no evidence of economic power in a market for service contracts, parts, hotline service or other Beckman items, to the extent that those are alleged to be the tying products. The Court would note that for these items, as for the analyzers and reagents, and for similar reasons, the market definitions cannot be confined to merely Beckman products. Therefore, just as the analyzers have insufficient economic power, so too these other items

have insufficient leverage in the relevant product markets. At best, the power for these items is the same as that for the analyzers themselves, though in reality, it may be even less. There is evidence of competition from other companies, such as Alpkem, which also supply parts and service for Beckman instruments. In any event, as noted before, the Court also finds no evidence of independent economic power, independent of that for analyzers, for any of these other products such that they might be considered tying products.

Nobel relies primarily on the argument that the existence of patents on parts of the Beckman machine means that Beckman has sufficient economic power. This argument is not valid. Most important, the patents are only on components of the Beckman analyzers and are not on the machines as a whole or on parts that do not have readily available substitutes. There is no dispute, and can be none, that many manufacturers make analyzers that do the identical chemical tests, and can do identical operations. The method may be different, but the result is the same.

For this reason, the cases Nobel cites, which state that patent monopolies give economic power, are not on point. If a patent or copyright is such that it gives the exclusive monopoly over a product, including over related products, then economic power will exist. *Fortner II,* at p. 619. That was the situation in the two cases cited most often to show that a patent or copyright can give economic power. *United States v. Paramount Pictures, Inc.,* 334 U.S. 131 (1948) as to a copyright and *International Salt Co. v. United States,* 332 U.S. 392 (1947) as to a patent. Absent an exclusive right or a patent covering a whole product, economic power cannot be assumed. Where there are numerous analyzers performing the same functions, the fact that parts of an analyzer may have patent protection is not critical.

What is more important, as demonstrated by cases dealing with market definition, is whether other products are interchangeable with the item, even despite the patents. *J. T. Gibbons, Inc. v. Crawford Fitting Co.*, 704 F.2d 787, 796 (5th Cir. 1983). In *duPont,* for example, cellophane was not a separate market despite the fact that it was patented. The Court finds helpful a recent statement in the *Jefferson Parish* case.

> A common misconception has been that a patent or copyright, a high market share, or a unique product that competitors are not able to offer, suffice to demonstrate market power. While each of these three factors might help to give market power to a seller, it is also possible that a seller in these situations will have no market power; for example, a patent holder has no market power in any relevant sense if there are close substitutes for the patented product. Similarly, a high market share indicates market power only if the market is properly defined to include all reasonable substitutes for the product.

Jefferson Parish, 104 S. Ct. at 1572 n.7, in Justice O'Connor's concurring opinion. In accordance with this, there is no market power in any tying product and Nobel's Clayton Act claims must fail. For the instruments, as well as service and parts, there are readily available substitutes, available from many people. Any attempt to raise price, or impose burdensome conditions, will merely result in customers avoiding Beckman. Without sufficient economic power, there can be no tying.

For all of the above reasons, no tying arrangement exists under either Section 3 of the Clayton Act or Section 1 of the Sherman Act.

Plaintiff also claims that Beckman has engaged in a refusal to deal. In 1979, Nobel placed an order to obtain an ASTRA 8 from Beckman, to be located at Howard University, allegedly so that Nobel could use the machine

to test its reagents. The purchase order was refused. A Beckman market specialist stated at deposition that the order was refused because "I didn't want to make it easier for a competitor to compete with us." Deposition of Larry Cohen, at 89. When Howard University then ordered the machine directly in its own name, the purchase order was accepted.

Nobel argues that this is a violation of Section 1 of the Sherman Act. Section 1 only applies, however, to a contract, combination or conspiracy," and there is no dispute that the action taken by Beckman was unilateral. Unilateral refusals to deal are legal, as stated in *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919):

> In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.

See also *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984). This right to take unilateral action includes the right to refuse to sell to a competitor. See *Pumps and Power Co. v. Southern States Industries, Inc.*, 1986-1 Trade Cases (CCH) Par. 67,020 at p. 62,289 (8th Cir. 1986). "Absent concerted action, the antitrust laws do not compel a nonmonopolist supplier to furnish a direct competitor with a component part of the finished product as to which the two compete." Therefore, the antitrust laws place no bar on defendant's unilateral conduct.

Nobel stresses that, under the rule in *Colgate,* Beckman's refusal to deal still might be illegal if done with the "purpose to create or maintain a monopoly." *Colgate,* 250 U.S. at 307. The Court agrees, but the relevant inquiry then becomes whether there has been a violation of Section 2 of the Sherman Act, and not whether

there has been a refusal to deal, which requires concerted action. Therefore, the refusal to deal may at best be viewed merely as one fact supporting Nobel's claim of monopolization, or attempted monopolization, by Beckman.

For all of these reasons, the motion of Beckman for summary judgment will be granted, and judgment will be entered in favor of the defendant.

JUDGMENT

(Filed October 27, 1987)

United States Court of Appeals for the Fourth Circuit

No. 86-2595

Nobel Scientific Industries, Inc.,
Plaintiff-Appellant,

v.

Beckman Instruments, Inc.,
Defendant-Appellee.

APPEAL FROM the United States District Court for the District of Maryland

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THIS CAUSE came on to be heard on the record from the United States District Court for the District of Maryland, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of

the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

JOHN M. GREACEN,
Clerk.

Petition for Rehearing:

Filed November 10, 1987
Denied February 3, 1988

(Filed February 3, 1988)

United States Court of Appeals for the Fourth Circuit

No. 86-2595

Nobel Scientific Industries, Inc.,
Plaintiff-Appellant,

v.

Beckman Instruments, Inc.,
Defendant-Appellee.

On Petition for Rehearing with Suggestion for Rehearing In Banc

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Russell, with the concurrence of Judge Phillips and Judge Sprouse.

For the Court

JOHN M. GREACEN,
Clerk.

In The United States District Court for the District of Maryland

Civil Action No. B-80-3073

Nobel Scientific Industries, Inc.

v.

Beckman Instruments, Inc.

ORDER AND JUDGMENT

Presently before the Court is Defendant's Motion for Summary Judgment (Paper 166), and supporting memorandum. Plaintiff has filed an opposition to such motion, and defendant has filed a reply to plaintiff's opposition. The Court has reviewed the record of proceedings, and all of the recently filed affidavits and exhibits which support the various pleadings filed on behalf of the parties. In addition, the Court has also had the benefit of oral argument from counsel for the parties at a hearing herein on July 11, 1986.

In accordance with oral opinion rendered by the Court this date, IT IS, this 11th day of July, 1986, ORDERED and ADJUDGED as follows:

1. That the Defendant's Motion for Summary Judgment (Paper 166) BE, and the same hereby IS, GRANTED;

2. That judgment BE, and the same hereby IS, ENTERED in favor of defendant, Beckman Instruments, Inc., against plaintiff, Nobel Scientific Industries, Inc., with costs; and,

3. That copies of this Order and Judgment are being hand-delivered this date to counsel of record for the parties to this action.

WALTER E. BLACK, JR.,
United States District Judge.

APPENDIX B

United States District Court
District of Minnesota
Fourth Division

Civil No. 4-83-940

Beckman Instruments, Inc.,
Plaintiff,

v.

Kallestad Laboratories, Inc.,
Defendant.

Richard L. Horn, Esq., David L. Appelgate, Esq. and Karon, Savikas & Horn, Ltd., 5700 Sears Tower, 233 South Wacker Drive, Chicago, Ilinois 60606, appeared on behalf of plaintiff.

Jerome B. Pederson, Esq., Clinton E. Cutler, Esq., and Fredrikson & Byron, 1100 International Centre, 900 Second Avenue South, Minneapolis, Minnesota 55402, appeared on behalf of defendant.

ORDER

This matter is before the Court upon plaintiff, Beckman Instruments' motion for summary judgment on each of defendant Kallestad Laboratories' antitrust counterclaims.

FACTS

Beckman Instruments, Inc. ("Beckman") initiated this action after Kallestad Laboratories, Inc. ("Kallestad") introduced QM2, the tradename for specific protein testing kits usable on Beckman's Immunochemistry Systems ("ICS"). Prior to 1982, Beckman was the only supplier of

testing kits for use on the ICS in the "normal" mode. It is this fact that has prompted Kallestad's antitrust counterclaims.

Immunodiagnostic tests are based upon the reaction between antigens and antibodies and are used to measure the concentration of substances, such as proteins or drugs, present in the blood or other body fluids.[1] Levels of certain proteins in body fluids, such as blood serum, are accurate indicators of the presence of various diseases. Therefore, diagnostic assays have been developed to facilitate the determination of such protein levels. Further, many therapeutic drugs are safe and effective only with a narrow range of concentration in the body. Thus, immunodiagnostic tests, several involving techniques nearly identical to those used in testing protein levels, have been developed to monitor levels of such drugs in the blood.

Methods for determining the level of certain proteins and/or drugs in body fluids include: radial immunodiffusion (RID), radioimmunoassay (RIA), fluorescence immunoassay (FIA), immunoelectrophoresis and nephelometry. Each of these technologies are based upon the principle that specific antigens (foreign substances which invade the body) will combine only with specific antibodies. The combination of the antibody and antigen forms a precipitate.

RID was the first immunochemical technique commercially available for the quantitation of specific proteins. Although RID was initially the only technique

[1] The reactions are conducted to determine the concentration of either the antigens or antibodies in a test sample. To determine the concentration of an antigen the reaction is conducted using an antibody. Conversely, for antibody determination, an antigen is used as the reagent. For simplicity, the protein tested for in the test sample will be referred to as an antigen and the reagent will be referred to as the antibody.

available, the advent of other methodologies has prompted a shift away from this technique. Among labs with small workloads, however, RID remains popular due to its low cost per reportable result. RIA may be used in laboratories possessing gamma radiation counters and the ability to comply with regulatory requirements for using radioactive materials. RIA technology involves the introduction of radio-labeled antigens along with the reagent into the test sample. Antigens in the test sample compete with the radio-labeled antigens for a limited number of antibody binding sites. FIA is a similar method but employs fluorescent labeling instead of radio labeling. There is evidence that FIA is becoming a popular alternative to RIA.

Immunoelectrophoresis involves passing an electric current through a plate upon which the test sample has been placed. A reagent is then added to the plate near the test sample and is allowed to diffuse. Then, the length and patterns of the precipitin arcs that form are analyzed and interpreted to determine the presence of certain proteins.

Nephelometry also rests on the principle that specific antigens combine with specific antibodies and that the antigen-antibody complexes form a precipitate capable of scattering light. The amount of scattered light is proportional to the protein or drug concentration. Within the category of nephelometric assays, there are two techniques, endpoint and rate nephelometry. Endpoint nephelometry measures the light scattered by the antigen-antibody complexes at equilibrium. Rate nephelometry measures the rate of increase in the intensity of light scattered by the antigen-antibody complexes.

The Beckman ICS is a microprocessor controlled rate nephelometer that practices diagnostic methods patented by Beckman.[2] It consists of an immunochemistry analyzer

[2] The '276 patent protects the method and apparatus for signalling the introduction of reagents into the ICS. The '837

that, when operated in the "normal" mode, introduces reagents and monitors the immunoprotein reactions. In the "normal" mode, instrument operating parameters and computations are programmed for a particular protein or drug analysis by means of optically encoded film program cards attached to each Beckman reagent vial which are inserted into a reader on the analyzer.[3]

Until the introduction of QM2, then, use of the Beckman ICS in the normal mode was dependent upon the purchase of Beckman reagents with the film program cards attached. This fact is the basis for Kallestad's contention that Beckman has monopolized or attempted to monopolize either of two product markets: (1) specific protein reagents suitable for use on the Beckman ICS when used in the "normal" mode or (2) the fifteen most commonly used protein reagents,[4] but excluding such reagents sold in the form of RID plates. Kallestad also alleges that Beckman has engaged in an unlawful tying arrangement by forcing ICS customers to produce Beckman reagents in order to practice the patented methods used in the normal mode of the Beckman ICS. Finally, Kallestad charges that Beckman instigated this litigation "in bad faith and as a sham" in "further attempt to tie reagent test kits to the ICS."

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patent protects the method of determining the need for post-addition of reagents to an antigen-antibody reaction to determine whether the reaction is in antibody or antigen excess. Use of these two patented methods results in a method of analysis that is technologically superior to other methods currently available.

[3] Routine determination of the major serum proteins are done almost exclusively in the "normal" mode. The Beckman ICS however, has a manual mode which uses the rate nephelometric technique but which enables the user to design and perform their own highly specific assays.

[4] Kallestad relies upon the affidavit of John Hyun for the identification of these protein reagents. The list encompasses the following proteins: AAT, A2M, albumin, Apo A-1, Apo B, C3, C4, ceruloplasmin, CRD, haptoglobin, IgA, IgG, IgM, RF, and transferrin. (Hyun affidavit at par. 8).

DISCUSSION

I. *Summary Judgment*

To survive Beckman's motion for summary judgment, Kallestad must establish that there is a genuine issue as to any material fact. Fed. R. Civ. P. 56(c). The test for the existence of a genuine factual issue is "not whether there is literally no evidence, but whether there is any upon which a jury could properly proceed to find a verdict for the party producing it . . . ." *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2511 (1986). Under this standard, all reasonable inferences must be drawn in favor of the nonmoving party and the burden of proof remains upon the party bearing the burden of proof at trial. *Id.* at 2514. Therefore, because Kallestad bears the burden of proof at trial on each of its antitrust counterclaims, it must provide evidence of the existence of each element of its counterclaims such that a reasonable jury could reach a verdict in its favor.

Beckman's motion for summary judgment on each of the antitrust counterclaims rests on its contention that Kallestad cannot meet its burden of establishing the existence of its narrow definition of the relevant product market. Although market definition is not an issue having its own significance under the antitrust laws, it is a prerequisite for establishing the existence of market power, an essential element of each of Kallestad's antitrust counterclaims. *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 13-14 (1984) (market power in tying product market is essential element); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 596 (1985) (market power essential element of monopolization claim); *United States v. Empire Gas Corp.*, 537 F.2d 296, 302-03 (8th Cir. 1976), *cert. denied*, 427 U.S. 1122 (1977). Thus, if Kallestad produces evidence from which a reasonable jury could conclude that its proposed market

definition is in fact the relevant product market, summary judgment may not be granted.

II. *Market Definition*

Often, many products serve functions similar to those of the product at issue. Determination of the competitive market for commodities depends upon the readiness and ability of consumers to turn to reasonable alternatives to the product in question. Thus, when defining the outer boundaries of a product market, courts must consider "the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe Co. v. United States,* 370 U.S. 294, 325 (1962). Within the outer boundaries of the product market, however, there are often well-defined submarkets which in themselves constitute separate economic entities. *United States v. Grinnell,* 384 U.S. 563, 572 (1966). Submarkets can be defined by examining practical factors such as: (1) industry or public recognition of the submarket as a separate economic entity; (2) the product's peculiar characteristics and uses; (3) unique production facilities; (4) distinct prices; (5) sensitivity to price changes; and (6) specialized vendors. *Brown Shoe Co.,* 370 U.S. at 325.

Kallestad's first proposed definition is the market for specific protein reagents suitable for use on the Beckman ICS when operated in the normal mode. Essentially, this proposed definition rests on Kallestad's assertions that the attachment of the ICS film program cards to vials of reagents creates a market that is sufficiently distinct in commercial reality and is relatively immune from competition of substitutes. Beckman disputes this definition and argues that the relevant market encompasses all clinical laboratory analytical systems and materials capable of performing serum protein and therapeutic drug monitoring tests.

Beckman's proposed definition rests partly on its assertion that the analyzer, reagents, and film program cards constitute an integrated system that competes with other integrated systems. Thus, reagents marketed for use on the ICS in the "normal" mode cannot constitute a separate product market. In *Jefferson Parish Hospital Dist. No. 2 v. Hyde,* 466 U.S. 2 (1984), a tying case, the Supreme Court stated that "the answer to the question whether one or two products are involved turns not on the functional relation between them, but rather on the character of the demand for the two items." *Id.* at 19. Several factors must be considered in this analysis: (1) whether buyers recognize two distinct markets; (2) whether the products are purchased in separate transactions; (3) whether there is a separate demand for the product. *Id.* at 19-24.

Kallestad has provided evidence from which a jury could reasonably conclude that two products are involved. Reagents for use on the ICS in the "normal" mode are, with the exception of the film program card attached to the reagent vial, virtually indistinguishable from other nephelometric reagents. The evidence reveals that for analyzers not using Beckman's patented methods, nephelometric analyzers and reagents are often purchased separately, and that these purchases are often made from suppliers that sell only reagents, thereby demonstrating that there is a demand for reagents apart from the demand for analyzers. Even among reagents suitable for use on the ICS in the "normal" mode, the fact that customers recognize separate markets is indicated by the dramatic shift from Beckman to Kallestad reagents once QM2 reagents became available.

Without the addition of the film program cards then, it would be undeniable that two product markets exist. Beckman's decision to attach the film program card to the reagent vial cannot transform what is essentially two

products into a single product. Product designs may have pro-competitive as well as anti-competitive effects. Product designs that have no purpose other than the preclusion of competition must be condemned. *Transamerica Computer Co. v. International Business Machines Corp.*, 481 F. Supp. 965, 1003 (N.D. Cal. 1979), *aff'd*, 698 F.2d 1377 (9th Cir.), *cert. denied*, 464 U.S. 955 (1983).

Beckman next contends that the components of one product can never constitute a relevant product market. Citing *General Business Systems v. North American Philips Corp.*, 699 F.2d 965 (9th Cir. 1983) and *Telex Corp. v. International Business Machines Corp.*, 510 F.2d 894 (10th Cir.), *cert. dismissed*, 423 U.S. 802 (1975), Beckman contends that the relevant market cannot consist solely of after-sale items for one manufacturer's products where competitive products exist. This argument is essentially a variant of its contention that the ICS and reagents constitute one product and rests on the proposition that, due to the necessity of the after-sale item, the competitive characteristics of the market for the primary product are capable of influencing the competitiveness of the after-sale market. Therefore, the market for the after-sale item cannot be separated from the market for the primary product.

Kallestad correctly observes, however, that the cases do not hold that a relevant market can *never* consist of after-sale items when the primary product market is competitive. Instead, the courts concluded that, given the market characteristics, such a definition was inappropriate. In fact, several courts have expressly held that the after-sale item constituted a relevant market. *E.g.*, *Digidyne Corp. v. Data General Corp.*, 734 F.2d 1336 (9th Cir. 1984), *cert denied* 473 U.S. 908 (1985). In the cases cited by Beckman, the after-sale item constituted a large percentage of the cost of using the system, the market for the primary product was highly competitive, and there

were low barriers to entry in the after-sale market. *General Business Systems,* 699 F.2d at 973-75; *Telex Corp.*, 510 F.2d at 917-19. Based on these market characteristics, the courts in these cases concluded that the seller of the after-sale item did not have the power to control the price of the after-sale item. Therefore, the relevant market could not consist solely of after-sale items for the product of a single manufacturer.

The market characteristics in this case, however, are distinguishable from those in *General Business Systems* and *Telex Corp.* First, Answer-Pak reagents[5] constitute, at most, 32% of the cost of operating the ICS. As Kallestad points out, this number is significantly lower than the 50-70% in the IBM peripheral device cases. Whether 32% is a sufficiently high portion of the total cost such that an increase in reagent prices would cause a shift to other methods of analysis is a question of fact that must be decided by a jury.

Second, the primary product market is much more concentrated in this case. Using the factors outlined in *Brown Shoe Co.* a reasonable jury could conclude that the relevant market encompasses specific protein testing on the Beckman ICS in the "normal" mode.[6] Undeniably, there are substitutes for the ICS in the "normal" mode. None of them, however, appears to operate on the same

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[5] Answer-Pak is a rental program, under which Beckman supplies the necessary analyzer, reagents and service in return for a monthly rental payment based upon the number of tests done on the machine.

[6] Deposition testimony provides strong evidence that the ICS is purchased almost exclusively for use in the "normal" mode (Schrecengost depo. at 18; Dalbow depo. at 37; Haas depo. at 29; Burke depo. at 18). Further, the evidence demonstrates the industry, as well as Beckman, distinguishes between the market for therapeutic drug monitoring assays and the market for specific protein assays (Kallestad exhibits F, G, and M; Beckman exhibits 22, 23 and 24).

the ICS in the "normal" mode. RID, RIA, FIA, and immunoelectrophoresis are functionally interchangeable to a considerable degree with the ICS. Nevertheless, because of the peculiar characteristics of RID and the other methods there does not appear to be a readiness or ability on the part of the consumers to turn to alternatives to the ICS. ICS, because of its superior speed, ease of use, and accuracy, is used primarily in high volume clinical laboratories. RID, the closest competitor of the ICS, is used primarily in low volume labs due to the low cost per reportable result and due to the long delay before test results are available. Further, there is also evidence that different vendors specialize in different types of immunochemical assays. Thus, under *Brown Shoe Co.*, Kallestad has presented sufficient evidence to raise a triable question of fact on the question of the relevant market for methods of specific protein assays.[7]

Lastly, Kallestad has provided strong evidence of high barriers to entry in the market for reagents for use on the ICS in the "normal" mode. Accordingly, this case is distinguishable from *General Business Systems* and it is possible for a reasonable jury to conclude that reagents for use on the ICS in the "normal" mode constitute a market independent of the market for analytic systems. This conclusion is supported by evidence submitted by Kallestad demonstrating that there is no interchangeability between Beckman's or Kallestad's ICS protein reagents and reagents produced for use on other systems; that there is high technological entry barrier which renders the threat of potential competition nearly nonexistent; and that the cost of RID plates is not considered in setting the price of ICS protein reagents.

Under *Brown Shoe Co.* then, a reasonable jury could conclude that the relevant submarket encompasses

[7] Kallestad's ability to raise a genuine issue of fact as to this issue precludes summary judgment on Kallestad's counterclaim alleging an unlawful tie-in.

specific protein reagents suitable for use on the Beckman ICS in the "normal" mode. From the above evidence a reasonable jury could also conclude that Kallestad's proposed alternative market definition constitutes a relevant market. Accordingly, Beckman's motion for summary judgment on Kallestad's counterclaims for monopolization, attempted monopolization, and unlawful tying must be denied.

III. *Patent Abuse Antitrust Claims*

Kallestad's third counterclaim contains an allegation that Beckman commenced this litigation in bad faith in a further attempt to tie its reagent test kits to the ICS. It is well established that the prosecution of a patent infringement suit with knowledge that the underlying patent is invalid provides the basis for an antitrust claim. *E.g. Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172 N.5 (1965); *Argus Chemical Corp. v. Fibre Glass-Evercoat Co.*, 812 F.2d 1381, 1385 (Fed. Cir. 1987); *Handgards, Inc. v. Ethicon, Inc.*, 601 F.2d 986, 994, 202 U.S.P.Q. 342, 349 (9th Cir. 1979), *cert. denied*, 444 U.S. 1025 (1980). To establish its counterclaim, Kallestad must demonstrate that the plaintiff fraudulently obtained the underlying patent and that it initiated its patent infringement action in bad faith, that is, with the knowledge that the patent was invalid. *Argus Chemical Corp.*, 812 F.2d at 1235. Further, in cases such as this, the patent owner's action for infringement is presumed to have been brought in good faith, a presumption that can be rebutted only by clear and convincing evidence.

Kallestad asserts that Beckman's failure to cite the '871 patent to the patent examiner handling the application for the '837 patent as prior art constitutes a fraud on the patent office. Assuming that this assertion is true, Kallestad must then establish by clear and convincing evidence that Beckman brought this action to enforce its

patent rights with the knowledge that the '837 was obtained fraudulently and is, therefore, invalid. To meet its burden Kallestad relies almost entirely on the affidavit of Richard Bartz and the attached exhibits. This affidavit is insufficient to meet the required standard of clear and convincing evidence. It merely explains the contents of the '837 file wrapper, and alleges that Beckman violated 37 C.F.R. § 1.56(b) (1978) by failing to enclose a copy of Beckman's application for the '871 patent in its application for the '837 patent. Although Beckman may not have complied with the precise requirements of the regulations, it is clear that Beckman completely disclosed the existence of the pending application for the '871 patent and notified the patent examiner when the '871 application was approved. These facts, combined with the fact that the file wrapper did not indicate that the '871 patent was considered as prior art, simply do not provide clear and convincing evidence supporting an inference that Beckman knew its patent was invalid. Therefore, summary judgment is appropriate on Kallestad's patent abuse antitrust claim.

For the reasons stated above IT IS HEREBY ORDERED that:

1. Beckman's motion for summary judgment with respect to Kallestad's counterclaims alleging monopolization, attempted monopolization, and unlawful tying is denied.

2. Beckman's motion for summary judgment with respect to Kallestad's patent abuse antitrust claim is granted.

DAVID S. DOTY, Judge,
United States District Court.

Dated: December 2, 1987